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No. 88-139

In The

Supreme Court of the United States

October Term, 1987

JAMES A. RHODES, et al.,

Petitioners,

v.

LARRY STEWART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the respondent a prevailing party pursuant to 42 U.S.C. §1988, so as to entitle him to attorney's fees under that statute?

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GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

I. OPINIONS BELOW

The case at bar was appealed on two separate occasions to the Sixth Circuit Court of Appeals. The first opinion was filed on November 9, 1982, (P.App.A-22)[1]. The second opinion was filed on April 27, 1988, (P.App.A-4). Both opinions are unreported. The decisions of the United States District Court for the Southern District of Ohio, Eastern Division are unreported, (P.App.15, 38). A petition for writ of certiorari was previously granted by this Court on May 31, 1983, (P.App.21). The decision of the Supreme Court of the United States was reported at 461 U.S. 952 (1983), (P.App.21).

II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) seeking review of the decision of the Sixth Circuit filed April 27, 1988.

STATUTES WHICH THE CASE INVOLVES

42 U.S.C. § 1988

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their

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[1] In this brief "P.App." denotes the appendix to the petition for certiorari.

vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statute of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On January 17, 1978, the immediate action was brought by Mr. Stewart and another inmate of the Chillicothe Correctional Institute, Albert Reese. This action was brought pursuant to 42 U.S.C § 1983, (P.App.52). The action sought injunctive relief and a judgment declaring that the poiicies and practices of petitioners violated the respondent's constitutional rights, (P.App.54). Respondents contended that the action of the petitioners in banning "Hustler" magazine was arbitrary, capricious,

without any legal foundation and was based upon no valid evidence, (P.App.53).

Beginning in May, 1976, Respondents Stewart and Reese were denied permission to acquire "Hustler" magazine as a matter of policy of the Ohio Department of Rehabilitation and Corrections, (P.App.53). In December, 1976, the Ohio Department of Rehabilitation and Corrections adopted Administrative Regulation 5120-9-19 to replace A.R. 814. A.R. 5120-9-19 sets forth the criteria to follow in banning printed material from Ohio's prisons as well as the procedure to appeal such a determination.

At the time of the initiation of this action, A.R. 5120-9-19 had been in effect for approximately one year. In banning "Hustler", petitioners had failed to follow their own administrative regulations which provide procedural safeguards to protect the rights of inmates, (P.App.28, 29). Additionally, the petitioners failed to apply the procedural or substantive standards established by the courts for determining what printed material may be made available to inmates, (P.App.28). The district court entered judgment on April 2, 1981, (P.App.35). Specifically, the district court found that the petitioners had failed to apply procedural safeguards established by the courts and their own administrative regulations before determining what printed material could be available to inmates, (P.App.28, 29). Thus, any attempt by the inmates to appeal an arbitrary banning decision would have been fruitless since the petitioners did not even provide notice, an opportunity to be heard, or an ultimate determination on the question by a disinterested decision maker.

On April 17, 1981, Respondent Stewart moved for attorney's fees, pursuant to 42 U.S.C. § 1988. On June 3, 1981, the motion was granted and petitioners were ordered to pay $5,325.85, (P.App.27). This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on May 25, 1982, (P.App.23).

This Court granted a petition for writ of certiorari on May 31, 1983 and the judgment was ultimately vacated and remanded to the district court for reconsideration in light of *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983), (P.App.21). For a second time, the district court awarded Respondent Stewart $5,325.85 in attorney's fees, (P.App.15). Again, this decision was affirmed by the Sixth Circuit on April 27, 1988, (P.App.4).

ARGUMENT IN SUPPORT OF DENYING CERTIORARI

A. NO CONFLICT WITH DECISIONS OF THIS COURT

The opinion and order of the court of appeals and the district court are not in direct conflict with the decision in *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983) and *Hewitt v. Helms*, 482 U.S. ___, 96 L.Ed.2d 654, 107 S.Ct. 2672 (1987).

The definition of a prevailing party for the purpose of awarding attorney's fees was stated in *Hensley, supra*, and further refined by *Hewitt, supra*. As held by the Sixth Circuit, the definition of "prevailing party" and the facts of the case *sub judice* do not preclude a finding that

Respondent Stewart is a prevailing party and thus entitled to attorney's fees pursuant to 42 U.S.C. § 1988, (P.App.8-9).

This Court in *Hensley*, at 461 U.S. 433, stated that "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."

This Court in *Hewitt*, further refined the definition of prevailing party for purposes of 42 U.S.C. § 1988. The Court in Hewitt held that a pronouncement by a court that the plaintiff had suffered a denial of due process did not constitute a sufficient relief to make the plaintiff a prevailing party. *Id.* at 661. This Court did go on to state in *Hewitt*, "[b]ecause of the defendant's official immunity he received no damages award." *Id.* "No injunction or declaratory judgment was entered in his favor." *Id.*

The district court has previously entered judgment holding that the petitioners did not provide procedural due process in deciding to ban "Hustler" (P.App.28), and that the petitioners also failed to follow their own administrative regulations in deciding whether "Hustler" was acceptable, (P.App.28, 29).

Pursuant to respondent's lawsuit and the district court's orders, the petitioners must now follow the administrative procedures outlined in A.R. 5190-9-19 (F) and (G) in providing procedural due process prior to classifying or banning "Hustler" magazine. Accordingly, Respondent Stewart has succeeded on a significant issue in this case which has achieved the benefit he sought in

bringing the suit. *See Hensley, supra*. Thus, he is entitled to an award of attorney's fees under 42 U.S.C. § 1988.

Accordingly, the decisions of the district court in the case *sub judice* are not in conflict with other decisions of this Court.

B. NO CONFLICT WITH OTHER CIRCUITS

Likewise, the decisions rendered in the immediate case are not in conflict with other federal courts of appeal. Petitioners assert the contrary and rely on the case of *National Coalition Against Abuse of Pesticides v. Thomas*, 828 F.2d 42 (D.C. Cir., 1987). The *Thomas* court held that merely obtaining a favorable declaration of the law does not suffice to qualify a claimant as a prevailing party. *Id.* at 44. The decisions in the immediate case do not conflict with the principle announced in *Thomas* and *Hewitt, supra*. Here, Respondent Stewart received more than a mere interlocutory order or declaration from the court. The judgment received by Respondent Stewart achieved a significant benefit sought in bringing the lawsuit. More importantly, the judgment received by Respondent Stewart compelled the prison officials to comply with constitutional due process as well as their own administrative regulations. Accordingly, petitioners claim that the decisions in the immediate case are in conflict with other courts of appeal is likewise without merit. The Sixth Circuit Court of Appeals has previously established that 42 U.S.C. § 1988 "should be liberally construed to achieve the public purposes involved in the congressional enactments." *Seals v. Quarterly County Court of Madison County*, 562 F.2d 396, 393 (6th Cir. 1977).

C. IMPORTANCE OF THE ISSUE

The district court has carefully reviewed the facts in the light of instructions from this Court and reached a conclusion the petitioners do not like. The Sixth Circuit Court of Appeals again reviewed the facts and concluded that they justified an award of attorney's fees consistent with this Court's instructions. The evaluation by the district court scarcely justified an appeal to the circuit court, let alone a review by this Court.

D. CONCLUSION

This case simply presents the spectacle of a sore loser trying to make litigation unaffordable by those who disagree with it. Twice the issue at bar has been before the District Court for the Southern District of Ohio, and twice respondent has prevailed. Twice the issue at bar has been before the Sixth Circuit, and twice respondent has prevailed. The courts below have properly applied the decisions of this Court, in opinions consistent with the other courts of appeal. Certiorari should be denied.

Respectfully submitted,

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